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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN F. GIBSON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented For Review

I. Whether the Court of Appeals erred by failing to reverse Petitioner's conviction where Petitioners right to a fair trial was violated by virtue of prosecutorial misconduct in final argument.

II. Whether the Court of Appeals erred by failing to reverse Petitioner's conviction where Petitioner was denied the right to present witnesses on his behalf, by virtue of the trial courts' refusal to admit the testimony of a proffered defense witness based upon a separation of witnesses order entered at the commencement of trial.

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Petitioner, John F. Gibson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on April 20, 1982.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is published in *United States* v. *Gibson*, 675 F.2d 825 (1982), and is attached hereto as Appendix A (A-1). The order of the Court on the Petition for Rehearing in Banc has not been published in official reports. A copy of the Order is attached hereto as Appendix B (B-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) to review the judgment of a Court of Appeals by writ of certiorari.

Statutes Involved

The following statutes are involved:

U.S. Const. amend. V and VI.

The list of those provisions is attached hereto as Appendix B (B-1).

Proceedings Below

The Petitioner, John F. Gibson, the former General Secretary-Treasurer of the Hotel and Restaurant Employees' and Bartenders' Union, was initially the subject of an eighteen count indictment filed in the Southern District of Ohio on March 24, 1979. Count I charged a violation of 18 U.S.C. § 1961 *et seq.*, (RICO), asserting that he embezzled Union funds on various occasions set forth in other portions of the indictment. Counts II and VII charged criminal violations of the Labor-Management Reporting and Disclosure Act (LMRDA), by virtue of false entries in Union records (29 U.S.C. § 439(c)). Counts X-XVI charged criminal violations of the LMRDA, alleging embezzlement of Union funds by virtue of unauthorized salary increases (29 U.S.C. § 439(c)). Counts II, IV, V, VII, VIII, similarly charged violations of 29 U.S.C. § 501(c), embezzlement of Union funds through the payment of travel expenses which were allegedly for non-business purposes. Count IV charged the defendant with conspiracy (18 U.S.C. § 371) to commit the embezzlement which is the subject of Count V (a June 1975 trip to Gaspe, Quebec, Canada). Count IX charged another 501(c) embezzlement by virtue of

the hiring of an alleged "no-show" employee. Counts XVII and XVIII charged violations of 26 U.S.C. §7206(1), for alleged overstatements of non-reimbursed employee business expenses in the defendant's 1974 and 1975 tax returns.

Petitioner's first trial commenced on September 24, 1979, the Honorable David S. Porter presiding. Prior to trial the Government moved to dismiss Counts III and VII, the false entry counts. At the conclusion of the Government's case, defendant moved for judgment of acquittal on all counts pursuant to Rule 29(a). The Court denied defendant's motion as to all counts with the exception of Count I (RICO) and Counts XVII and XVIII, upon which he deferred ruling. Jury deliberations commenced on October 3, 1979. On October 6 the jury returned the following verdicts: not guilty, on one count of the travel charges (VI), all of the unauthorized salary counts (X-XVII), and the 1975 tax count (XVIII); guilty on the 1974 tax count (XVII), and they were unable to reach verdicts on Counts I, II, IV, V, VIII and IX. A mistrial as to said counts was declared.

Subsequent to trial and after the submission of briefs and argument, the defendnt's Motion for Judgment of Acquittal as to Count I (RICO) and Count XVII (1974 tax) was granted on March 14, 1980 and a reported opinion was issued, *United States* v. *Gibson*, 486 F. Supp. 1230 (S.D. Oh. 1980).

A re-trial on the remaining counts was set before another Trial Judge of the Southern District of Ohio, and commenced on May 19, 1980. The result of this trial is the subject matter of this Petition. The following so-called "travel" counts were presented to the Jury: II (May 1975 Lake Ozark trip); IV and V (June 1975 Gaspe trip); VIII (November 1975 Sacramento trip). Also before the jury was Count IX, which involved the alleged "no-show" employee.

Jury deliberations commenced on May 27, 1980 and they announced their verdicts May 30, 1980. Guilty verdicts were rendered as to Count IV (Gaspe conspiracy) Count V (Gaspe

trip) and Count VIII (Sacramento trip). The defendant was found not guilty on Count II (Lake Ozark trip) and Count IX (no-show employee). The defendant Petitioner was sentenced to four months imprisonment on Counts IV, V and VIII, said sentences to be served concurrently.

The defendant appealed his conviction in the United States Court of Appeals for the Sixth Circuit. On April 20, 1982, the Circuit Court affirmed Petitioner's conviction. Petitions for Rehearing and Rehearing In Banc were filed, and in an order dated August 8, 1982, the Court of Appeals denied said petitions.

On August 8, 1982, Petitioner filed a Motion to Stay Mandate, and by Order dated August 18, 1982, the motion was allowed.

Pursuant to an order of the Honorable Carl B. Rubin, United States District Judge, the Petitioner was permitted to remain on personal recognizance bond pending the outcome of his appeal.

Statement of the Case

The facts elicited during the trial were extensive and no detailed summary is possible. Accordingly, only the facts relevant to the issues raised in this petition will be presented for consideration.

A. Sequestration Issue

As to the counts for which the Petitioner was convicted, the Gaspe trip (Counts IV and V) and the Sacramento trip (Count VIII), the defense relied heavily upon the testimony of witness Edward Hanley, the General President of the Hotel and Restaurant Employees International Union [hereinafter "Union"]. As to the Gaspe trip, Hanley testified that there were business reasons for the travel and that he in fact authorized the activity.

In the Spring of 1975, he testified there were severe problems with the Union's organizational efforts in Canada, primarily due to the separatist movement in Quebec. At this time, the Canadian locals in Quebec were requesting help through the International by way of financial subsidy. Concurrently, the locals in Montreal were having difficulties with a merger occurring between two formerly separate craft units, and finally, Canadian based unions were "raiding", or attempting to change membership of employees who were members of the Hotel and Restaurant Employee's Union. These problems were the subject of discussion and action in a January 1975 executive board meeting of the Union and Hanley testified that after the meeting he discussed the threefold problem of the Quebec locals with Gibson and asked him to travel to Quebec to appraise the situation first hand. He stated that after the Gaspe trip, he and Gibson discussed the matter thoroughly.

Hanley's testimony concerning the Sacramento trip was that he accompanied Gibson and other Union officials, and visited various locals in the Bay Area of California. During the course of the trip, they discussed in detail the serious problems the Union was facing by virtue of the activities of Ray Lane, the chief officer of the Oakland based local. He related that Gibson indicated that he knew Helene Hallett (Helene Perry at the time), who was part of the group which advocated the removal of Lane and she was very knowledgeable, because of her position in the local, as to the nature and type of grievances of the Union members. Hanley also indicated that he was reluctant to become directly involved in talking with Hallett since, if charges were brought by another Union member, they would ultimately be decided by the General President. As a result of that, he asked Gibson to bring Hallett along to see if they could find anything out further from her about the problems in Local 28. He testified that after his conversation with Gibson, either that evening or the next evening he observed

her with Gibson in Sacramento. Hanley testified that as a result of Gibson's meeting with Hallett that evening, he had a discussion with Gibson concerning the problems of Local 28 and Gibson suggested that an auditor should get in there to take a look at financial matters more closely.

In seeking to establish the purpose underlying Hanley's order to Gibson to have Hallett fly to Sacramento, defense counsel examined Edward Hanley as to what measures the Interanational undertook as a result of this trip as well as of the complaints received preceding November 11, 1975 regarding the fiscal mismanagement of Local 28 in Oakland, headed by Ray Lane. He testified that the International was prompted to conduct a special internal audit *after* November 11, 1975. In earlier testimony, he recounted the problems concerning the Oakland local prior to the Bay Area trip, referring to a letter of October 16, 1975 from John Gibson to Ray Lane, concerning the preliminary findings of a routine closing "merger" audit. The letter pointed out several discrepancies which were discovered in closing the local's books prior to establishing a new accounting system at the "merged" local over which Lane was also to preside. On cross-examination, the prosecution asked Hanley how a letter dated October, 1975 could have related to an audit he said was ordered after November 11, 1982:

> Q. Mr. Hanley, I believe you testified this morning that this letter contained the references to the results of that audit; is that correct?
>
> A. Yes sir.
>
> Q. Mr. Hanley, explain to the ladies and gentlemen how the contents of that letter could be referring to an audit that was based upon a conversation that was held on November 11 and the date of that letter is October of the same year.

A. Well, it doesn't seem possible, does it, Mr. Hanley? The conversations took place after the auditor went in there. I evidently overlooked that date.

The confusion in Hanley's testimony concerning the audit dates was totally unexpected by the defense, and resulted, in part, from Hanley's unfamiliarity with the intricacies of the Union's internal financial audits, as it was Gibson, the General Secretary-Treasurer, who was responsible for the fiscal management of the Union, including making reports and writing to locals about audit results. Hanley was further confused by the misleading assertion in the prosecution's question that the letter, Defendant's Exhibit L, referred to the in-depth internal audit instituted after the Bay Area trip when in fact the letter referred to a routine audit.

In an effort to clarify the confusion regarding the relevant dates and in anticipation of the prosecution's attempt to undermine the credibility of Hanley as a result thereof, the defense sought to call as a witness Joseph Clair, who in *late November*, 1982 was an auditor assigned by the International to conduct an in-depth financial audit of the Oakland local.

In an offer of proof to the trial court of the materiality, relevancy and necessity of Clair's testimony, through which the defense could correct the error in Hanley's testimony, defense counsel asserted that the testimony of Joseph Clair would establish the existence of two distinct audits: one a routine audit conducted in October, 1975; and the other an extraordinary or special audit commenced after November 11, 1975, at the direction of Hanley and Gibson. The trial court precluded Clair from testifying because he had attended sessions of the trial after the court had issued an order for separation of witnesses. Clair was in the courtroom specifically to assist the defendant and his counsel during the trial, and, as the confusion in Hanley's testimony was unforseeable, defense counsel had absolutely no reason to anticipate the need to call

Clair as a witness at the time of the severance order. In seeking to correct the error in Hanley's testimony, defense counsel attempted to elicit the information which would have been put before the jury by Clair through John C. Kenneally, a Union administrative agent charged with supervising local Union mergers in 1975. However, auditing was "not [his] area of responsibility". Although in his testimony Kenneally acknowledged that the International had instituted both a routine audit and a special audit, and that Gibson had instructed Clair to conduct the in-depth audit of the local, he could not remember specifically when the International had commissioned Clair to conduct the special audit and that it may have been late October or late November, 1975.

In ruling on this matter, the Sixth Circuit stated that the defendant was not prejudiced by the trial court's action in refusing to allow proffered witness, Jospeh Clair, to testify since a "substitute" witness, John Kenneally, "gave substantially identical testimony to that Clair would have given...." 675 F.2d at 836. The Circuit Court, in a footnote, went on to state that its decision in this regard might have differed if Clair had been the "only" witness available. (675 F.2d at 836, fn.6).

B. Final Argument Issue

In his appeal to the Sixth Circuit the defendant asserted that there were several separate instances which amounted to misconduct during the prosecution's final arguments. For purposes of this Petition, the defendant will address only what he submits was the most egregious portion of the final argument. The misconduct of the prosecution upon which the Petitioner relies for the relief sought herein occurred when the representative of the United States, over defense objection, urged the jury to disregard the Petitioner's defense because his counsel "dwelled" upon the Government's burden of proof and the constitutional standard reasonable doubt in his summation.

The portion of the Government's final argument referred to is as follows:

> One of the first indications of the infirmity of this defense is Mr. Bailey's dwelling on the government's burden of proof, upon reasonable doubt and how you should apply it. Judge Rubin will instruct you on what the government's burden of proof is. He will instruct you on what reasonable doubt is. Some might say that argument should be spent on the facts and the evidence that has been presented than on something the trial judge is going to tell you about anybody. But then again, if you really don't have a defense, maybe you better emphasize reasonable doubt. That's all you have got.

The trial court, despite defense counsel's objection and protestation that a defendant should be permitted to argue the standards of reasonable doubt and the government's burden of proof to any extent he wishes, (so long as he does not mistate the issues), refused to take any remedial action. And, in affirming the defendant's conviction, the Sixth Circuit stated merely that it

> "...found no merit in Gibson's final contention that the prosecution's closing arguments constituted misconduct."

675 F.2d at 836.

Reasons for Granting the Writ

A. The Opinion of the Court of Appeals for the Sixth Circuit is Contrary to the Provisions of the Sixth Amendment's Guarantee of a Fair and Impartial Jury and is in Conflict With the Decisions of This Court.

In its final argument the prosecution urged the jury to disregard the defense presented on behalf of the Petitioner because defense counsel "dwelled upon" the government's burden of proof and upon the standard of reasonable doubt. As set forth above, counsel for petitioner objected vehemently to the argument employed by the government and urged the trial court to grant a mistrial, or alternatively, to forcefully instruct the jury to disregard the statements in question. The trial court refused to take any action, and the Court of Appeals, without discussion, ruled that the statements did not constitute misconduct.

The issue this Court is urged to act upon is an important one, and one that requires the attention of the Court. If it is ever proper for the prosecution to utilize arguments which are obvious attempts to have the jury disregard the burden of proof or the standard of reasonable doubt, then this Honorable Court should clearly so state; if it is wrong for the prosecution to utilize such tactics, as the defendant strenuously asserts, this Court should similarly take this opportunity to act and forcefully mark the boundary between acceptable conduct on the part of the prosecution and foul play.

The Petitioner respectfully asserts that the failure of this Court to act on this issue will leave all defendants open to arguments similar to that practiced against him whenever a defense counsel mentions the presumption of innocence, and the government's burden of proof beyond a reasonable doubt

in a final address to the jury. Attempts to abrogate the presumption of innocence and the dilution of the standard of reasonable doubt should never be countenanced. Indeed, as this Court has held, these concepts are the bedrock of our system of criminal justice:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.
>
> . . . .
>
> 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

In re Winship, 397 U.S. 358, 363-64 (1970) (quotations omitted).

Comparing the language quoted above with the argument of the prosecutor the argument of the prosecutor in this case leads to the obvious conclusion of prosecutorial misconduct of sufficient gravity to mandate the reversal of Petitioner's conviction.

> *One of the first indications of the infirmity of this defense is Mr. Bailey's dwelling on the government's burden of proof, upon reasonable doubt and how you should apply it. Judge Rubin will instruct you on what the government's burden of proof is. He will instruct you on what reasonable doubt is. Some might say that argument should be spent on the facts and the evidence that has been presented rather than on something the trial judge is going to tell you about anybody. But then again, if you really don't have a defense, maybe you better emphasize reasonable doubt. That's all you have got."* (Emphasis supplied).

Further, the stand taken by this Honorable Court in *Berger* v. *United States*, 295 U.S. 78, 88-89 (1934), requires that prosecutorial blows struck as foul as that depicted above receive the attention of this Court; it is an unfortunate consequence of our jury trial system that the zeal to convict often eclipses the bounds of legal propriety. When that occurs, as it so often has in recent years, it is incumbent upon this Court to act in a manner which forcefully upholds every citizen's constitutional right to a fair and impartial jury and due process of law. The prosecution should never be able to urge the jury to disregard the standard of reasonable doubt and force the defendant to prove his innocence. The actions of the government in the instant case amounted to no less.

B. The Opinion of the Court of Appeals for the Sixth Circuit Is Contrary to the Provisions of the Fifth and Sixth Amendments' Guarantee to Due Process of Law and the Right To Present Witnesses on a Defendant's Behalf and Is in Conflict With Decisions of This Court.

The Court of Appeals for the Sixth Circuit upheld the trial court's exclusion of a critical defense witness because that witness had remained in the courtroom during portions of the trial despite a sequestration order. The Sixth Circuit decision, based on a determination the trial court had not abused its discretion in excluding that witness, ignores the intrusion upon petitioner's constitutional right to present relevant testimony in his behalf, as guaranteed by the Sixth Amendment, and the extreme prejudice suffered by the Petitioner as a result of the exclusion of the witness. Moreover, it is respectfully submitted that the Court of Appeals' decision on this issue seriously misconstrues the record in the case at bar, and accordingly, only upon a complete review of that record can this Court properly assess the full impact and scope of the error below.

A fact recognized by both petitioner and the government below was that the principal defense witness at both trials below was Edward Hanley, General President of the Union of which petitioner was Secretary-Treasurer. As detailed in the Statement of the Case, with respect to Count VIII of the Indictment,[1] Hanley had substantiated that Petitioner's Sacramento trip, which was the subject matter of that Count, was for business purposes because the trip was made at Hanley's request.[2] This union purpose was further evidenced

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[1] Count VIII, one of the three counts of which petitioner was convicted, charged a violation of 29 U.S.C. §501(c) by alleged embezzlement of union funds through the payment of expenses for travel which was allegedly for non-business purposes.

[2] That request was made in order that petitioner could obtain information from Helene Hallett, an employee of the Oakland Local, about Ray Lane, her supervisor, whom the International was investigating for fiscal mismanagement.

by the fact that, according to Hanley, as a result of the trip, the International was prompted to conduct a special audit of the Oakland Local which occurred after November 11, 1975, the date of the trip.

On cross-examination, Hanley became confused concerning an October, 1975 letter he had produced during earlier testimony, which letter made reference to an audit predating the Sacramento trip. Hanley cound not account for what, on the surface, appeared to be a discrepancy in the dates of the audit. As stated by the Court of Appeals:

> Hanley failed to state that the audit mentioned in the October letter was a routine audit, but that another special audit was made after November.

675 F.2d at 825. Hanley admitted, nowever, he was unfamiliar with the Union's internal audit procedures.

It was thus imperative that the defense cure Hanley's mistaken chronology, which, unrepaired, cast serious doubt on credibility of all of Hanley's testimony and, more specifically, raised significant questions concerning the purpose and result of the Sacramento trip.

The defense sought to explain the so-called "apparent discrepancy" (675 F.2d at 825) occasioned by Hanley's testimony on cross-examination, which testimony could not have been anticipated by the defense, by the testimony of Joseph Clair, the individual who had actually conducted the audit of the Oakland Local. Because Clair had been present in the courtroom earlier in the trial and because the court had invoked a witness sequestration order at the commencement of the trial, Clair was not permitted to take the stand.

As noted above, the Sixth Circuit upheld the District Court on the basis that Clair's exclusion was not an abuse of discretion because Clair was in the courtroom with petitioner's knowledge and consent and because "[d]efense counsel should

have anticipated that Clair's testimony concerning the dates and scope of each audit might be necessary." 675 F.2d at 836. The Court of Appeals' analysis completely fails to consider the constitutional ramifications of the trial court's failure to allow the testimony of a pivotal prospective witness whose testimony might well have changed the result in a case when the government's proof was far from overwhelming.[3]

Justice Black, dissenting from the denial of a petition for a writ of certiorari in *Braswell* v. *Florida*, 400 U.S. 873 (1970) (Black, Douglas and Brennan, JJ., dissenting), best described the reason for rejecting the Sixth Circuit's position in the case at bar:

> While the "Witness Rule" has a valid purpose and can contribute to the search for truth, a breach of the rule cannot be used to deny a criminal defendant his constitutional right to obtain and present witnesses in his favor. U.S. Const. Amend. VI; cf. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). *A simple rule of courtroom "fairness" has been misused to destroy a sacred constitutional right.*
>
> I would grant certiorari in this case and reverse the conviction below so that the defendant might have the right to present his side of the story.

(Emphasis added).

In *Washington* v. *Texas*, *supra*, this Court held that a defendant's Sixth amendment right to compulsory process is denied by state procedural statutes that prevented the introduction of testimony from witnesses who are charged as principals, accessories or accomplices of the defendant. While the *Washington*

[3] In this regard, it is important to note that the Sixth Circuit, in reviewing the sufficiency of the evidence, was compelled to conclude that their decision that sufficient evidence existed to support the jury's verdict depended upon the discrediting of two important defense witnesses, one of them being Hanley. 675 F.2d at 825. The overwhelming impact of the petitioner being refused the opportunity to rehabilitate Hanley through Clair's testimony is thus readily apparent. Moreover, under such circumstances it cannot be held that, if the Court of Appeals was wrong in upholding the trial court's exclusion of Clair, the error was harmless.

court criticized the "absurdity" of the Texas rule, as distinguished from the rational "Witness rule" under consideration in the case at bar, this Court has clearly recognized that when a conflict emerges between a Constitutional protection and a procedural rule, that conflict must be resolved in favor of the Constitution. As this Court said in the *Washington* case:

> The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.

388 U.S. at 23. It is submitted that the inflexible adherence to the sequestration order by the trial court in the instant case has the same nullifying effect on the Sixth Amendment as the rules under attack in *Washington*.

The Court below relied heavily on this Court's opinion in *Holder* v. *United States*, 150 U.S. 91 (1893), in which it was stated that "the right to exclude *under particular circumstances may* be supported as within the sound discretion of the trial court." *Id.*, at 92 (emphasis added). The import of the *Holder* decision, however, is precisely the decision urged upon this Court in the case at bar, *i.e.*, that other remedies exist for a violation of a sequestration order and that a witness should not be fully disqualified on that basis alone. As the *Holder* court stated:

> If a witness disobeys the order of withdrawal . . . he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground, merely . . .

Id. It is significant that the *Holder* case was decided without even the necessity of reaching the Sixth Amendment issue raised in this Petition.

Finally, this Court is urged to review and reject the Sixth Circuit's conclusion that petitioner was not prejudiced by the exclusion of Clair because his "substitute witness [Kenneally] gave substantially identical testimony to that Clair would have given..." 675 F.2d at 836. A review of the record, and indeed, a glance at the testimony of Kenneally quoted by the Court below (*id.*), clearly establishes that Kenneally did not testify with certainty about the timing of the special audit of the Local (after November 11, 1975) and, in fact, specifically could not recall whether that audit was in September, October or November. Thus, Kenneally was totally unable to either correct Hanley's mistaken testimony or repair Hanley's damaged credibility—which was precisely the unexpected role petitioner sought of Clair.

It is therefore respectfully submitted that the substantial prejudice suffered by Petitioner as a result of the denial of his Sixth Amendment rights and the misapplication of the sequestration order should warrant the granting of a writ of certiorari by this Honorable Court.

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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